

In the Matter of Anthony Stallworth

CSC Docket No. 2007-3236

(Civil Service Commission, decided July 27, 2011)

The Supreme Court of New Jersey has remanded the matter of the proper disciplinary action for Anthony Stallworth to the Civil Service Commission (Commission) to reconsider the appellant's disciplinary history and for the Commission to address the concerns regarding the effect the appellant's reinstatement would have on deterring other employees from similar misconduct. *See In the Matter of Anthony Stallworth, ___N.J.___* (April 12, 2011).

As background, the appointing authority charged the appellant with falsification of official records, leaving the work area without permission, personal use of a Camden County Municipal Utilities Authority (Authority) vehicle, conduct that would reflect discredit upon the Authority during work hours, perpetration of any false or fraudulent act involving or against the Authority, conduct unbecoming a public employee, misuse of public property, including motor vehicles, and other sufficient cause. Specifically, the appointing authority asserted that the appellant took his fifteen minute break in excess of one hour and fifteen minutes with a company vehicle without authorization.

The ALJ set forth in his initial decision that the essential facts were not in dispute and that the appellant had taken his assigned truck to a convenience store for his morning break, and was gone from his assigned station for approximately one hour and fifteen minutes. The appellant testified that he has dietary restrictions due to diabetes, and he tries to eat in the morning before taking medicine. The appellant also asserted that he had been taking his lunch and his morning break together for years without any issues and his supervisor was aware of this situation. The appellant stated that he did not call the supervisor on his cell phone concerning his lateness because he did not have the supervisor's cell phone number, and he could not use the truck's phone as he had misplaced the truck keys while at the convenience store. The Assistant Director of Operations and Maintenance testified that the appellant falsified official records by not indicating that his time records were inaccurate due to this break and the appellant was paid for his time on break.

The ALJ found that the appellant had violated the appointing authority's rules by leaving the work area without permission during work hours and being in possession of an Authority vehicle for more than the allotted 15 minute break time. With regard to the charge of falsification of official records, the ALJ found that the appellant did not falsify official records. In determining the penalty, the ALJ concluded that the appellant violated two critical rules of the employee handbook which could subject him to immediate discharge. Further, the ALJ found the

incident egregious enough to warrant the appellant's removal. Therefore, the ALJ upheld the penalty of removal.

Upon its *de novo* review of the record, the Merit System Board¹ agreed with the ALJ's determination of the charges but not the recommendation to uphold the removal. The Board stated that it was not bound by the appointing authority's penalty schedule. In determining the proper penalty, the Board noted that the appellant was a 17-year employee with a disciplinary record which only evidenced one major disciplinary action, a 15-day suspension, and several minor disciplinary actions. Further, the Board did not conclude that the appellant's conduct was of such an egregious nature so as to impose a penalty of removal regardless of any mitigating factors. Therefore, the Board determined that a four-month suspension was the proper penalty.

Subsequently, the appointing authority appealed the Board's decision to the Appellate Division. The Appellate Division determined that it could not reconcile Stallworth's disciplinary history with the Board's characterization of it as evidencing only "one major disciplinary action," and several minor ones. It noted that the appellant's disciplinary history included numerous charges which had been sustained. The Appellate Division asserted that these offenses were not minor in nature. Further, it found that the appellant's disciplinary history showed a blatant disregard of his most basic obligations as a public employee. Therefore, the Appellate Division reversed the Board's decision and remanded the matter for entry of an order affirming the decision of the ALJ removing the appellant.

Thereafter, the appellant petitioned for certification of the Appellate Division's decision. The Supreme Court granted certification and, in its decision, agreed with the Appellate Division that the Board's decision did not clearly indicate that it considered the appellant's full disciplinary history. However, the Court determined that the Appellate Division exceeded its authority in reinstating the removal because the impact of the prior disciplinary record was a subject particularly within the expertise of the Board/Commission. In this regard, the Court essentially found that the discussion of the appellant's prior disciplinary record was superficial. The Court stated that it was insufficient for the Board to base its reversal of the ALJ on the fact that the discipline record contained "only" one major disciplinary action. In doing so, the Board "gave short shrift to Stallworth's entire disciplinary record." Further, the Court also found that the Board failed to address the appointing authority's concerns regarding the effect the appellant's reinstatement would have on deterring other employees from similar

¹ On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board (Board) to the Civil Service Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Civil Service Commission. In this decision, the former names will be used to refer to actions which took place prior to June 30, 2008.

misconduct and its need to protect its public image by appropriately disciplining its employees. Therefore, the Court remanded the matter to the Commission to squarely address “the discrepancy in evaluating the disciplinary record,” explain with transparency its evaluation of Stallworth’s disciplinary record, and address the appointing authority’s concerns about the impact of reinstatement.

On remand, the appellant, represented by Peter B. Paris, Esq., argues that there was no discrepancy in the appellant’s disciplinary record and that the Appellate Division and the appointing authority, not the Board, confused the record. He contends that while the Administrative Code clearly defines major and minor disciplinary actions, the Appellate Division and the appointing authority chose to ignore these statutory definitions. Additionally, the appellant asserts that the appointing authority argued that the appellant was subject to two major disciplinary actions without providing any evidence in support of its claims. The appellant asserts that he was only subject to one major disciplinary action, a 15-day suspension, as indicated in the Board’s original decision. Further, the appellant contends that his full disciplinary record was entered into evidence at the Office of Administrative Law, and he disagrees with the Court’s finding that the Board did not consider the entire record simply because it did not discuss each minor penalty at length. In this regard, the appellant argues that minor disciplinary matters are not reviewable by an ALJ or the Commission. Therefore, it would be unfair to lend much weight to these actions handed out by employers without any third party review. By contrast, major disciplinary actions may be reviewed by an ALJ and the Commission, and a guilty finding carries infinitely more weight than a finding of guilty by just the employer. Moreover, the appellant argues that there was no negative impact upon his reinstatement and that he has not been disciplined since his return in August 2009.

The appellant also provides clarification of the two prior disciplinary actions regarding misuse of a company vehicle. In 1998, he received a “counseling session” for personal use of a vehicle. In that session, the appointing authority noted that the appellant did not technically violate the rule as written. The second “misuse” occurred when the appellant had use of a take-home vehicle because he was on 24-hour call, and he used the vehicle while using a floating holiday. The appellant denied knowing the policy. In the instant matter, the appointing authority argued that the reason the charge of personal use of a vehicle should be sustained was not because he took the vehicle, but because he kept the vehicle for longer than the allotted 15-minute break. Employees were permitted to take company vehicles on breaks.

In reply, the appointing authority, represented by Scott W. Carbone, Esq., contends that the Board failed to recognize the seriousness of the charges against the appellant as well as his lengthy prior disciplinary history. Additionally, the appointing authority asserts that the present incident was egregious enough to

warrant removal. Further, it argues that the Board did not correctly define “major” discipline. The appointing authority states that the Board defined major discipline as a suspension greater than 15 days in its decision, rather than following *N.J.A.C. 4A:2-2.2(a)*, which defines the term as a suspension greater than five days. In this regard, the appointing authority asserts that under *N.J.A.C. 4A:2-2.2(a)* the appellant had two prior major disciplinary actions. Moreover, the appointing authority asserts that pursuant to the Court’s decision in the present matter, the Commission has to consider the contextual nature of an offense and not simply the quantum of discipline. The appointing authority provides the following descriptions of the appellant’s prior disciplinary history:²

- April 5, 2006 – The appellant used a company vehicle on a day that he had called out of work to use a floating holiday (Three-day suspension).
- May 17, 2004 – While attending a training session on sensitivity, the appellant used the “N” word when making a statement on black people to the presenter (Employee Warning).
- November 27, 2000 – The appellant returned to work after a suspension and threatened an employee who had testified at the hearing (Employee Warning).
- October 11, 2000³ – The appellant was charged with creating a hostile work environment, sexual harassment, conduct unbecoming a public employee, endangering the life of his co-workers, and performing work of inferior quality. Specifically, it was alleged that the appellant made comments to co-workers of a sexual nature, sped when he drove the truck, did little or no work, yelled and cursed at co-workers and supervisors, and would not stay and watch when he was the safety man (15-day suspension).
- January 18, 2000 – The appellant was five to 10 minutes late for a meeting and was argumentative with his supervisor about being late. Before the end of the meeting the appellant stood up, cursed, and left the meeting (Two-day suspension).
- June 23, 1998 – The appellant failed to respond to page and radio calls requesting that he respond to an alarm. The appellant was witnessed in the company vehicle at the time of the requests (Employee Warning).

² While the appointing authority listed the incidents underlying the disciplinary actions, it failed to indicate the penalties imposed. The penalties imposed in the parentheses () at the end of each description are supplied by the appellant in his submissions and appear to accurately coincide with the exhibits originally entered into evidence at the OAL hearing.

³ The appointing authority incorrectly listed the date of this incident as occurring in “2007.”

- February 11, 1998 – The appellant deliberately broke into new fixed temperature thermostats and short circuited them so that heaters would run (Employee Warning).
- September 26, 1996⁴ – The appellant was careless/negligent in his duties and did not leave the pumps in the proper positions. The appellant acknowledged that he was responsible as he was the operator on duty at that station (One-day suspension).
- September 9, 1996 – The appellant failed to check on his assistant's actions, which he should have done as he was aware of the assistant's lack of knowledge (One-day suspension).
- September 5, 1996 – The appellant failed to gas up his vehicle as instructed (Employee Warning).
- September 5, 1996 - The appellant failed to gas up his vehicle, empty the truck, check vehicle fluid levels, and left all but one utility box unlocked (Two-day suspension).
- June 26, 1996 – The appellant failed to follow directions in cleaning a well (Employee Warning).
- August 26, 1993 – The appellant was observed sleeping while on duty (Three-day suspension).
- June 29, 1993 – The appellant received a written warning for performing work of an inferior quality (Employee Warning).

Finally, the appointing authority argues that the appellant's extensive disciplinary history, which reveals a history of recidivism, lack of remorse for past failings, and the unlikelihood of rehabilitation also make it clear the progressive discipline has run its course with this employee.

CONCLUSION

Initially, the appointing authority alleges that the Board in its decision defined a major disciplinary action as a 15-day suspension or greater. The Board did no such thing. The appointing authority merely misunderstood the Board's explanation that the appellant had one major disciplinary action in his record,

⁴ The appointing authority incorrectly listed the date of this incident as occurring in "2006."

which happened to be a 15-day suspension. In this regard, the Commission notes that the appointing authority claims that the appellant had another major disciplinary action of over five days but does not elaborate as to which incident this was and what the penalty was.

Additionally, the appointing authority continues to contend that the present incident was sufficiently egregious to warrant removal. *See Carter v. Bordentown*, 191 N.J. 474 (2007). However, the Court found that it did not need to address the issue of whether the present incident was sufficiently egregious to warrant removal as the Board originally rejected this premise and the Appellate Division did not reject that conclusion. Rather, the Court remanded the matter to the Commission to re-analyze the case applying the standards of progressive discipline by addressing the discrepancy in evaluating the disciplinary record, explain with transparency its evaluation of Stallworth's disciplinary record, and address the appointing authority's concerns about the impact of reinstatement.

The discrepancy in evaluating the disciplinary record arises from the appointing authority and the Appellate Division's failure to recognize that major and minor disciplinary actions are defined in *N.J.A.C.* 4A:2-2.2(a) and *N.J.A.C.* 4A:2-3.1(a) or their desire to attach another meaning to the term "major disciplinary action." *N.J.A.C.* 4A:2-2.2(a) defines a major disciplinary action as removal, disciplinary demotion, or a suspension or fine for more than five working days at any one time. *See also, N.J.S.A.* 11A:2-14. Pursuant to *N.J.A.C.* 4A:2-3.1(a), minor discipline is a formal written reprimand or a suspension or fine of five working days or less. *See also, N.J.S.A.* 11A:2-16. Neither the appointing authority nor the Appellate Division provided a definition as to what a major or minor disciplinary action was other than to review specific incidents and subjectively determine whether there were major or minor violations. The Commission reviews a significant number of disciplinary matters and while each incident is analyzed based on the specific facts of that incident, when reviewing prior disciplinary matters where progressive discipline is called for, the Commission will give more weight to prior major disciplinary actions than to minor disciplinary actions. There are several reasons why the Commission does this. First, logically, the more severe the past action was, the more severe the disciplined imposed. This gives an indication of just how poorly an employee has performed or acted in the past. Moreover, major disciplinary actions can be appealed by an employee to the Commission and reviewed by an ALJ and the Commission after a *de novo* hearing. Next, minor disciplinary actions are considered. Again, logically, these incidents are, necessarily, considered to be not as severe as the incidents resulting in major disciplinary action, or constitute the first time that the conduct occurred or rose to the level of requiring discipline. These disciplinary matters, while generally not reviewable by an ALJ or the Commission, are provided some sort of review as set forth in *N.J.A.C.* 4A:2-3.1 *et seq.* Finally, non-disciplinary actions, such as warnings both written and verbal, are considered. Such "disciplinary actions" are

appropriately given little or no weight as they can generally not be appealed or challenged by the employee and are generally not open to review by an independent third party.

In reviewing the appellant's entire disciplinary record, the Commission notes one major disciplinary action in 2000 consisting of a 15-day suspension. Also noted are six minor disciplinary actions which include three-day suspensions in 2006 and 1993, two-day suspensions in 2000 and 1996, and two one-day suspensions in 1996. The other seven disciplinary actions described by the appointing authority are Employee Warnings. Employee Warnings are **not** considered disciplinary actions pursuant to *N.J.A.C. 4A:2-2.2(a)* and *N.J.A.C. 4A:2-3.1(a)* as they do not rise to the level of an Official Written Reprimand. *See In the Matter of Joseph Ellis* (MSB, decided July 7, 1999). While the Commission has reviewed each of the Warnings, it is not appropriate to give significant weight to the Warnings as the appellant apparently did not have recourse in receiving these. In fact, on the Warnings, the appellant wrote in comments challenging the charges but it is unclear if his explanations were considered and it does not appear that a third party reviewed the charges or that any formal disciplinary process was instituted or followed. These prior actions cannot be rehashed and reargued in an attempt to determine whether the charges were properly brought forth and whether the incidents were "major" infractions.

The appointing authority argues that most of the charges against the appellant, whether minor disciplinary actions or Employee Warnings constituted "major" infractions. However, it only sought to impose actual major disciplinary action on one occasion prior to the matter at hand, in 2000. The appointing authority's employees are covered under Civil Service law and regulations. The discipline of these employees, for major disciplinary actions, falls under the purview of the Commission. In determining the proper penalty, in addition to its consideration of the seriousness of the underlying incident, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). The concept of progressive discipline is not new and has been used by the Commission and Civil Service jurisdictions for many decades. Under such a concept, an appointing authority must diligently carry out its duty to appropriately discipline employees when necessary. It is the appointing authority's responsibility to establish that it has been progressively increasing the penalty against a "problem" employee but that its efforts have not stopped the problematic behavior. It would be patently unfair for an appointing authority to give out warning after warning then jump to removal for an employee committing the same infraction. In the instant matter, the appointing authority failed to carry out its duty to properly discipline this employee if it truly believed that all of the appellant's prior disciplinary matters were indeed "major" infractions.

In determining the proper penalty, the Commission has reviewed all of the appellant's prior disciplinary history, including major discipline, minor discipline, and the Employee Warnings. In this regard, the Commission notes that in determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. In assessing the penalty in relationship to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including prior disciplinary history. Again, the Commission emphasizes that it has reviewed and considered the appellant's entire disciplinary history, including all of the Warnings. Although every disciplinary matter was reviewed and considered, the Commission affords more weight to the major disciplinary actions than to minor disciplinary actions and Employee Warnings. In this regard, the Commission notes that several of the Employee Warnings appear to have been minor incidents or offenses; the Commission can understand how the appointing authority, at the time, decided not to impose formal discipline for such actions; contrary to its current assertions regarding the seriousness of those offenses. Moreover, five of the Warnings and four of the minor disciplinary suspensions took place 10 years prior to the current incident. Finally, the Commission notes that the appellant was a 17 year employee at the time of the incident at issue. Accordingly, after this painstaking review, given that the appellant has only one prior major disciplinary action, and in applying the tenets of progressive discipline, the Commission finds that a four-month suspension is the proper penalty in this matter.

Further, the Court ordered that the Commission to address the appointing authority's concerns regarding the effect the appellant's reinstatement would have on deterring other employees from similar misconduct and its need to protect its public image by appropriately disciplining its employees. In this regard, the Commission notes that that the appellant's conduct was unacceptable and emphasizes that, in imposing a major disciplinary action it is not acting to minimize the seriousness of the offense. The Commission is mindful that this penalty should serve as a warning to the appellant that future offenses may result in his removal from employment. Additionally, the Commission found, and the Appellate Division and Supreme Court agreed, that the appellant's current actions were not sufficiently egregious to warrant removal on its own. Therefore, the concept of progressive discipline had to be utilized. Using the proper methods to impose discipline as establish by law, rules and case law serves both the public interest and the employers' and employees' interest by providing a fair and consistent manner in which public employees are disciplined. A four-month suspension is a significant penalty which shows both the public and other employees that inappropriate behavior will not be tolerated. Such a penalty projects the proper image to the public and serves as a reminder to employees about proper behavior.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a four-month suspension.